Dato' Ting Check Sii v Marine Utama Sdn Bhd & Anor

HIGH COURT (SIBU) — COMPANIES (WINDING UP) NO SBW-28–4/6 OF 2012
SUPANG LIAN J
18 JANUARY 2013

Civil Procedure — Res judicata — Issue estoppel — Whether previous suit decided that first respondent was a quasi-partnership — Whether issue estoppel or res judicate applicable

Companies and Corporations — Winding up — Just and equitable grounds — Directors having lost confidence in working with each other resulting in deadlock in management — Company unable to comply with its statutory obligations — Substratum of company ceasing to exist for over nine years — Whether company must be quasi-partnership for the 'just and equitable' limb to apply — Whether just and equitable to wind up company under s 218(1)(i) of the Companies Act 1965

The petitioner petitioned for the winding up of the first respondent company ('the company') under s 218 of the Companies Act 1965 ('Act') on the grounds that: (a) the company was a dormant company and had ceased to be a viable entity for more than nine years since 2003; (b) the company had breached various statutory duties under the Act; (c) the substratum of the company had completely disappeared and gone; and (d) it was just and equitable the company be wound up pursuant to s 218(1)(i) of the Act. The company was incorporated on 5 April 1984. The petitioner and the second respondent were the only two surviving shareholders of the company. They were close personal friends. The company was incorporated out of that friendship to carry out the business of shipping. The company was running as a quasi partnership between the petitioner and the second respondent with the day to day management left to both the petitioner and the second respondent. The only principal client of the company was Achi Jaya Transportation Sdn Bhd ('Achi Jaya') which was owned by the family members of the second respondent. Achi Jaya abruptly terminated all transport services with the company after the relationship between the petitioner and the second respondent soured. Numerous suits and counter-suits were filed between the petitioner and the second respondent. The company ceased carrying on any business and there was no one to manage the company. The petitioner was locked out from the registered office and was denied access to all accounts and records. The company had also not prepared its annual accounts and had not held any AGM since 2003. The respondents submitted that the petition should be dismissed for the following reasons: (i) the company was not a quasi-partnership as decided in a previous decision of

the High Court and thus, issue estoppel or res judicata applied; (ii) the petitioner failed to prove the alleged quasi-partnership; (iii) the petitioner had not come to court with clean hands; and (iv) an order for winding up of the company was not an appropriate remedy and the petitioner had not proven any justification for such a drastic order. According to the second respondent, the petitioner in a previous suit had claimed that the company was part of the Sanyan Group and was a quasi-partnership company. The learned trial judge in that suit had found that the Sanyan Group did not come within the definition of domestic company and that winding up of company on quasi-partnership principle can only be readily applied in cases relating to domestic companies. The respondents also submitted that under the 'just and equitable' limb of s 218, the petitioner must prove his allegation that the company was a quasi-partnership.

Held, allowing the application and ordering the first respondent be wound up:

(1) The decision in the previous suit did not decide that the first respondent was a quasi-partnership. All that was decided in so far as the first respondent was concerned was that the Sanyan Group (which included the first respondent) did not come within the definition of domestic company and that winding up of company on quasi-partnership principle can only be readily applied in cases relating to domestic companies. There was no specific finding that the first respondent company was a quasi-partnership. Thus, there was no question of the principle of issue estoppel or res judicata being of any application in the present case (see para 13).

(2) It is not essential and therefore not a condition that before the *Ebrahimi v Westbourne Gallaries Ltd & Ors* [1973] AC 360 principles can be applied, the elements or at least one of the elements must be present. Thus there was no merit in the contention of the respondents that the petitioner must prove that the company was a quasi-partnership under the 'just and equitable' limb of s 218 of the Act. Also, there was no merit in the contention that the three elements mentioned in *Ebrahimi*'s case must be fulfilled before the just and equitable ground could apply (see para 18).

(3) Since Achi Jaya was the sole client of the company, the irresistible inference was that the main object of the first respondent was providing transportation. In view that Achi Jaya had ceased doing business with the company and suspended all operations since 2003, the main objective for which the company was established had lapsed and ceased to exist. The company had thus lost its substratum since 2003, more than nine years ago (see para 25).

(4) The relationship between the petitioner and the second respondent had irretrievably broken down leading to loss of mutual trust and confidence

thereby resulting in deadlock in management. Since the company had ceased to carry on its main objective which was the business of transportation since 2003, the substratum of the company had completely disappeared. It is well settled that if the main object of a company has disappeared, the court can order winding up under the just and equitable rule. Further, the company had not been able to comply with its statutory obligations for years due to the acrimony and dispute between the petitioner and the second respondent. Hence, it was just and equitable to order that the company be wound up under s 218(1)(i) of the Act (see para 26).

[Bahasa Malaysia summary

Pempetisyen mempetisyen untuk penggulungan syarikat responden pertama ('syarikat') di bawah s 218 Akta Syarikat 1965 ('Akta') atas alasan-alasan bahawa: (a) syarikat tersebut merupakan sebuah syarikat yang tidak aktif dan telah berhenti untuk menjadi entiti yang berdaya saing untuk lebih daripada sembilan tahun sejak 2003; (b) syarikat tersebut telah melanggar pelbagai kewajipan statutori di bawah Akta; (c) asas syarikat telah tiada dan hilang sepenuhnya; dan (d) adalah adil dan saksama untuk syarikat tersebut digulungkan menurut s 218(1)(i) Akta. Syarikat telah ditubuhkan pada 5 April 1984. Pempetisyen dan responden kedua adalah dua pemegang saham syarikat yang tinggal. Mereka merupakan teman rapat. Syarikat tersebut ditubuhkan melalui persahabatan untuk menjalankan perniagaan perkapalan. Syarikat berjalan sebagai separa perkongsian antara pempetisyen dan responden kedua dengan pengurusan harian ditinggalkan kepada kedua-dua pempetisyen dan responden kedua. Satu-satunya klien tunggal syarikat ialah Achi Jaya Transportation Sdn Bhd ('Achi Jaya') yang dimiliki sepenuhnya oleh ahli keluarga responden kedua. Achi Jaya tiba-tiba menamatkan semua perkhidmatan pengangkutan dengan syarikat selepas hubungan antara pempetisyen dan responden kedua menjadi buruk. Pelbagai guaman dan guaman balas difailkan antara pempetisyen dan responden kedua. Syarikat berhenti menjalankan sebarang perniagaan dan tiada sesiapa yang menguruskan syarikat. Pempetisyen tidak dibenarkan memasuki pejabat berdaftar dan dinafikan akses kepada kesemua akaun dan rekod. Syarikat juga tidak menyediakan akaun tahunan dan tidak mengadakan Mesyuarat Agung Tahunan ('MAT') sejak 2003. Responden-responden menghujah bahawa petisyen tersebut perlu ditolak atas alasan-alasan berikut: (i) syarikat bukanlah separa perkongsian seperti yang diputuskan dalam keputusan Mahkamah Tinggi sebelumnya dan oleh itu, isu estoppel dan res judicata digunakan; (ii) pempetisyen gagal untuk membuktikan separa perkongsian yang didakwa; (iii) pempetisyen tidak datang ke mahkamah dengan perlakuan yang adil 'clean hands'; dan (iv) satu perintah untuk penggulungan bukanlah remedi yang bersesuaian dan pempetisyen tidak membuktikan sebarang justifikasi untuk perintah drastik tersebut. Menurut responden kedua, pempetisyen dalam guaman terdahulu mendakwa bahawa syarikat tersebut merupakan sebahagian

daripada Kumpulan Sanyan dan merupakan syarikat separa perkongsian. Hakim perbicaraan yang bijaksana dalam guaman tersebut mendapati bahawa Kumpulan Sanyan tidak terangkum dalam definisi syarikat tempatan dan bahawa penggulungan syarikat atas prinsip separa perkongsian hanya boleh digunakan dalam kes-kes berkaitan kepada syarikat-syarikat tempatan. Responden-responden juga menghujah bahawa di bawah prinsip 'adil dan saksama' s 218, pempetisyen perlu membuktikan dakwaannya bahawa syarikat tersebut merupakan separa perkongsian.

Diputuskan, membenarkan permohonan dan mengarahkan responden pertama untuk digulungkan:

(1) Keputusan dalam guaman terdahulu tidak memutuskan bahawa responden pertama merupakan separa perkongsian. Apa yang diputuskan berkenaan responden pertama ialah bahawa Kumpulan Sanyan (termasuk responden pertama) tidak terangkum di dalam definisi syarikat tempatan dan bahawa penggulungan syarikat berdasarkan prinsip separa perkongsian hanya boleh digunakan dalam kes-kes berhubung syarikat-syarikat tempatan. Oleh itu tiada dapatan spefisik bahawa syarikat responden pertama merupakan separa perkongsian. Oleh itu, tiada persoalan prinsip isu estopel atau res judicata diguna pakai di dalam kes ini (lihat perenggan 12).

(2) Adalah tidak penting dan oleh itu bukanlah satu syarat bahawa sebelum prinsip-prinsip *Ebrahimi v Westbourne Gallaries Ltd & Ors* [1973] AC 360 boleh digunakan, elemen-elemen atau sekurang-kurangnya satu daripada elemen-elemen mesti ada. Oleh itu tiada merit dalam hujahan responden-responden bahawa pempetisyen perlu membuktikan bahawa syarikat merupakan separa perkongsian di bawah prinsip 'adil dan saksama' s 218 Akta. Juga, tiada merit dalam hujahan bahawa ketiga-tiga elemen yang disebut dalam kes *Ebrahimi* perlu dipenuhi sebelum alasan adil dan saksama boleh digunakan (lihat perenggan 18).

(3) Memandangkan Achi Jaya merupakan satu-satunya klien syarikat, inferens menarik yang dibuat adalah tujuan utama responden pertama ialah menyediakan pengangkutan. Memandangkan Achi Jaya telah berhenti menjalankan perniagaan dengan syarikat dan menggantung kesemua operasi sejak 2003, objektif utama yang mana syarikat tersebut ditubuhkan telah luput dan tidak lagi wujud. Syarikat dengan itu telah kehilangan asasnya sejak 2003, lebih daripada sembilan tahun lalu (lihat perenggan 25).

(4) Perhubungan antara pempetisyen dan responden kedua tidak dapat diselamatkan lagi dan membawa kepada kehilangan kepercayaan dan keyakinan, dengan itu mengakibatkan kebuntuan dalam pengurusan. Memandangkan syarikat telah berhenti menjalankan objektif utamanya iaitu perniagaan pengangkutan sejak 2003, asas syarikat telah hilang

sama sekali. Penyelesaian yang baik ialah sekiranya objektif utama syarikat telah hilang, mahkamah boleh mengarahkan penggulungan di bawah prinsip adil dan saksama. Seterusnya, syarikat tidak dapat mematuhi kewajipan statutorinya selama bertahun-tahun disebabkan permusuhan dan pertikaian antara pempetisyen dan responden kedua. Oleh itu, adalah adil dan saksama untuk mengarahkan bahawa syarikat tersebut digulungkan di bawah s 218(1)(i) Akta (lihat perenggan 26).]

Notes

For cases on issue estoppel, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7210–7229.

For cases on just and equitable grounds, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1326–1335.

Cases referred to

Chen Yoke Choy v Chen Yoke Leen & Ors [2011] 1 LNS 185, HC (refd)

Dato' Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors [2007] 5 MLJ 339; [2008] 7 CLJ 453, HC (refd)

Datuk Haji Mohammad Tufail bin Mahmud & 4 Ors v Dato' Ting Check Sii & 8 Ors Case No KCH-28–13/3 of 2012, HC (unreported) (refd)

Ebrahimi v Westbourne Gallaries Ltd & Ors [1973] AC 360, HL (refd)

German Date Coffee, Re (1882) 20 Ch D 169 (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34; [2010] 8 CLJ 775, CA (refd)

Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors [1996] 2 MLJ 666, CA (distd)

Liew Jai Hua v Johor Property (M) Sdn Bhd [1998] 2 CLJ Supp 34 (refd)

People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors [1986] 1 MLJ 68; [1985] 1 LNS 158 (refd)

Perbadanan Kemajuan Pertanian Selangor v Megafores Nursery Sdn Bhd & Ors [2010] MLJU 1572; [2011] 8 CLJ 484, HC (refd)

Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326; [1987] 1 LNS 110 (refd)

Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769; [1995] 1 LNS 99, SC (refd)

Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors and other applications [1994] 3 MLJ 89, HC (refd)

Legislation referred to

Companies Act 1965 s 218, 218(1)(i)

Yap Hoi Liong (Tang & Company) for the petitioner.

Sim Hui Chuang (Lim Lip Sze and Wilian Yeo with him) (JM Lim & Co Advocates) for the respondents.

Supang Lian J:

INTRODUCTION

[1] This is a petition by the petitioner to wind up the first respondent company ('the company') under s 218 of the Companies Act 1965. The grounds broadly speaking are:

(a) the company is a dormant company and has ceased to be a viable entity for more than nine years ie since 2003;

(b) it has breached various statutory duties under the Companies Act 1965;

(c) the substratum of the company has completely disappeared and gone; and

(d) it is just and equitable the company be wound up pursuant to s 218(1)(i) of the Act.

The petition is opposed by the second respondent.

CASE FOR THE PETITIONER

[2] The company was incorporated on 5 April 1984. The petitioner is a shareholder and a contributory of the company since its inception and now holds 33% of the shareholding in the company. As at 28 April 2012 the shareholding of the company is as follows:

	Name		Total Shares
(a)	Ting Check Sii, Dato'	…	6,666
(b)	Mohammad Tufail bin Mahmud, Dato'Haji	…	6,667
(c)	Mohammad Arip bin Mahmud, Dato (the deceased).		6,667

The shares of the deceased shareholder are still registered in his name.

[3] The petitioner and the second respondent were close personal friends and business confidants and have incorporated many different companies for joint business ventures and mutual financial benefit. The company is one of those companies incorporated out of that friendship. The memorandum of association (exhs TCS2) states the first object of the company as:

> 3(a) To carry on the business of shipping, shipping proprietors, ship and vessel owners, barge and lighter owners, carriers of cargo and passengers, navigations, shippers, jetty and dock proprietors.

The company was therefore incorporated specifically to carry out the business of 'shipping'. This is also indicated in the business profile of the company filed with SSM (TCS1).

[4] The company was running as a quasi partnership between the petitioner and the second respondent with the day to day management left to both the petitioner and the second respondent. There was only one principal client of the company and that is Achi Jaya Transportation Sdn Bhd ('Achi Jaya'). It is owned by the family members of the second respondent. Achi Jaya abruptly terminated all transport services with the company after the relationship between the petitioner and the second respondent soured.

[5] The petitioner alleges that the company became the victim of the strained relationship between the petitioner and the second respondent that started in 2003. The strained relationship is reflected in the numerous suits and counter-suits filed in court totaling 11 between the petitioner and the second respondent. The company has now ceased to be a viable entity because it does not carry on any business and there is no one to manage the company. There is no longer any employee of the company. The petitioner was kicked out of management when he was locked out from the registered office. All accounts and records are kept at the registered office and the petitioner is unable to access the documents. There is now a deadlock in management because there are only two surviving shareholders.

[6] Furthermore, the company has not prepared its annual account since 2003. The last audited account was for the year ended 31 December 2002. The company does not have a validly elected board of directors and has not called any AGM since year 2003 onwards. The company no longer has any employee or assets to carry out its principal business activity of transportation services since 2003. Since 2003 the company has totally lost its substratum in carrying on the business. There is no other viable business for it to carry on. Also, the deadlock in management and the total loss of confidence of the existing shareholders mean that there is no chance for the company to be functioning as an on-going entity.

[7] The company cannot overcome the crisis reached in management particularly that the second respondent through callous attitude and indifference had nearly let the company to be struck out by the registrar of companies when he failed to file the annual return, audited financial statement and minutes of the AGM since 2003. It was through the petitioner's intervention that prevented the striking out with an undertaking to take remedial action.

[8] The company will continue to remain dormant as there is no more

intention to carry on any business activity between the parties since there is a complete breakdown of their relationship. There is no more mutual trust and confidence with each other which results in a deadlock in the management of the company. The petitioner believes that it is in the interest of the company that it is wound up and the assets distributed. He contends that there is no point in keeping a dormant company with merely some cash assets intact and waiting for the Registrar to strike it out which will complicate matters.

[9] Based on the argument that the company has been dormant for at least six years and that its substratum has completely disappeared and gone, the petitioner applies to wind up the company under the 'just and equitable' limb of s 218 of the Companies Act 1965. There is an additional prayer for TV Sekhar a/l TG Venkatesan and Tan Ghee Kiat of Sekhar & Tan to be appointed as the liquidator of the company.

THE CASE FOR THE RESPONDENTS

[10] The respondents submit that the petition should be dismissed for the following reasons:

(a) the company is not a quasi-partnership as decided in a previous decision of the High Court. Thus, issue estoppel or res judicata applies;

(b) in any event, the petitioner has failed to prove the alleged quasi-partnership

(c) the petitioner has not come to court with clean hands; and

(d) an order for winding up of the company is not an appropriate remedy and the petitioner has not proven any justification for such a drastic order.

RES JUDICATA/ISSUE ESTOPPEL

[11] The respondents submit that the petitioner's allegation of loss of substratum and dormancy turns on his allegation that the company was actually a quasi-partnership. However, the High Court in *Dato' Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors* [2007] 5 MLJ 339; [2008] 7 CLJ 453 has decided on the issue of whether the company is a quasi-partnership. According to counsel, the petitioner in that previous case had claimed that the company (the first respondent) is part of the Sanyan Group and is a quasi-partnership company. The learned trial judge had considered at length the authorities on winding up on the 'just and equitable' ground and 'quasi-partnership' and had found that the Sanyan Group (which includes Marine Utama Sdn Bhd, the first respondent herein) did not come within the definition of domestic company and that winding up of company

on quasi-partnership principle can only be readily applied in cases relating to domestic companies. The decision was upheld in the Court of Appeal and leave to appeal to the Federal Court refused. Counsel submitted that the petitioner is bound by issue estoppel and/or res judicata.

[12] In response, the petitioner submitted that the winding up petition in the case of *Dato' Ting Check Sii* [2008], involves Sanyan Holdings Sdn Bhd which is neither the holding company nor an associated company of the first respondent in the present case. It is trite law that a holding company and its subsidiaries are distinct legal entities in law (see *People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd & Ors* [1986] 1 MLJ 68; [1985] 1 LNS 158). The issue of quasi-partnership raised in that case is in respect of Sanyan Holdings Sdn Bhd and not the first respondent. Hence, the decision of the High Court on the issue of quasi-partnership in the case of Sanyan Holdings Sdn Bhd was based on the facts of that case which are entirely different to the facts of the present case. The learned judicial commissioner found that Sanyan Holdings Sdn Bhd is not a quasi-partnership as it has other related companies who are subsidiary companies or alike having different shareholders and directors.

[13] With respect, the decision of *Dato' Ting Check Sii* [2008], did not decide that the company (the first respondent) was a quasi-partnership. All that was decided in so far as the first respondent is concerned is that the Sanyan Group (which includes the first respondent) did not come within the definition of domestic company and that winding up of company on quasi-partnership principle can only be readily applied in cases relating to domestic companies. There was no specific finding that the first respondent company was a quasi-partnership. That being the case, there is no question of the principle of issue estoppel or res judicata being of any application in the present case.

WHETHER QUASI-PARTNERSHIP MUST BE PROVED

[14] The respondents submit that under the 'just and equitable' limb of s 218 of the Act, the petitioner must prove his allegation in his pleading that the company is a quasi-partnership. In support counsel cited the decision of *Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors* [1996] 2 MLJ 666 at pp 672–673 where the Court of Appeal held, inter alia, that:

> … where a company is in substance an incorporated partnership, a winding up order may be made (under the just and equitable rule) in situations where a partnership may be dissolved by the court. But where the company is not in substance an incorporated partnership, such situations are no longer grounds for a winding-up order to be made under the rule as the use of the partnership analogy is no longer valid.

In the instant case, the petitioner asks for the company to be wound up merely because it is in substance an incorporated partnership. But that is not enough. For a winding up order under the just and equitable rule to be made, in the case of a partnership like company, there must be shown situations where a partnership may be dissolved by the court. None are shown in the petition.

[15] The respondents also relied on the decision of *Ebrahimi v Westbourne Gallaries Ltd & Ors* [1973] AC 360 where Lord Wilberforce at p 375 has explained that the use of the term 'quasi-partnership' is just a convenient term to describe the factual circumstances which would give rise to equitable considerations and upon which the court's jurisdiction under the 'just and equitable' ground may be exercised. The respondents argue that because the petitioner must prove 'quasi-partnership' it follows that he must prove all the three elements of quasi-partnership laid down by Lord Wilberforce in *Ebrahimi*'s case. The petitioner has not satisfied any of these elements.

[16] With respect, the case of *Kok Fook Sang*, can be distinguished. Unlike the petitioner in the present case who relies on the ground of loss of substratum and dormancy, the petitioner in that case had grounded the petition merely on the allegation that the company was in substance an incorporated partnership. For that reason, the petitioner in that case was required to establish his sole pleaded ground that the company in question was a partnership-like company. In the present case, the petitioner is also relying on the loss of substratum and the fact of dormancy to invoke the just and equitable provision. It is to be noted that the respondent has not been able to cite any authority that states that the just and equitable limb of s 218(1) of the Act is solely applicable to quasi-partnership companies. As His Lordship Ravinthran Paramaguru JC pointed out in *Datuk Haji Mohammad Tufail bin Mahmud & 4 Ors v Dato' Ting Check Sii & 8 Ors* Case No KCH-28–13/3 of 2012, High Court at Kuching, unreported, in a number of cases involving non-partnership companies, the petitioners have invoked the 'just and equitable' limb on the ground that the substratum of the company had collapsed or that it had remained dormant without attracting the adverse comment that they are required to prove that the 'quasi-partnership' existed (see *Perbadanan Kemajuan Pertanian Selangor v Megafores Nursery Sdn Bhd & Ors* [2010] MLJU 1572; [2011] 8 CLJ 484 and *Chen Yoke Choy v Chen Yoke Leen & Ors* [2011] 1 LNS 185).

[17] With regard the decision in *Ebrahimi*'s case, I need only to refer to the decision cited by counsel for the petitioner, namely, *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd & Ors v* [1994] 3 MLJ 89. The appellants in that case had also argued that the elements mentioned in the judgement of Lord Wilberforce must be present before a company can be regarded as one that is imbued with the characteristics of a quasi-partnership. They further contended

that the three elements identified are the conditions on which the court would be prepared to import equitable considerations. Siti Norma Yaakob J, as she then was, said at pp 100–101:

> I cannot accept this contention as the judgment does not say that. It merely sets out the circumstances under which the equitable considerations can be adopted and by way of an illustration, the three elements were stated as examples of circumstances where the just and equitable provision can apply. I emphasise that *Ebrahim*'s case does not lay down any test when the 'just and equitable' provision can be applied. On the contrary, Lord Wilberforce has warned against limiting the meaning of the clause 'just and equitable' and that it is wrong to create categories or headings under which cases must be brought if the clause is to apply.

On appeal to the Supreme Court, the same point was taken. Wan Adnan FCJ after a review of the authorities held as follows (see *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769; [1995] 1 LNS 99):

> We are of the view that the learned judge was correct in her interpretation of the judgment of Lord Wilberforce. It is not essential and therefore not a condition that before the *Ebrahimi* principles can be applied, the elements or at least one of the elements mentioned by Lord Wilberforce must be present. To interpret in the way contended by the learned counsel would be putting something in the judgment which is not there.

[18] Thus, based on the authorities referred to above, there is no merit in the contention of the respondents that the petitioner must prove that the company is a quasi-partnership under the 'just and equitable' limb of s 218 of the Act. Also, there is no merit in the contention that the three elements mentioned in *Ebrahimi*'s case must be fulfilled before the just and equitable ground can apply.

CAN THE COMPANY BE WOUND UP UNDER THE 'JUST AND EQUITABLE' GROUND BASED ON THE LOSS OF THE SUBSTRATUM OF THE COMPANY WITHOUT PROVING THE REQUIREMENTS OF THE THREE ELEMENTS IN EBRAHIMI'S CASE

[19] As mentioned above, the respondents take the stance that resort to the just and equitable principle can only be had if the petitioner can prove quasi-partnership and the three elements of *Ebrahimi*'s case. But I think there is an abundance of authorities saying to the contrary. In fact the contrary position appears to be settled law.

[20] We shall start with the decision of the Court of Appeal in *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34; [2010] 8 CLJ 775 where Abdul Malik Ishak JCA said:

> [23] What is just and equitable would vary from case to case. Thus, a company

may be wound up where it is just and equitable that the company should be wound up. So many reasons can be advanced to wind up a company under the just and equitable principle and the following illustration will suffice:

(a) where the substratum of the company has gone (*Galbraith v Merito Shipping Co* [1974] SC 446; *Re Kitson & Co Ltd* [1946] 1 All ER 435; *Re Mediavision Ltd* [1993] 2 HKC 629; *Re Senson Auto Supplies Sdn Bhd* [1987] 1 LNS 110; and *Goodwealth Trading Pte Ltd, Re* [1991] 2 CLJ 1648 …

(b) where the company's main object for its existence has lapsed. …

(c) where the principal object of setting up the company can no longer be achieved.

…

[24] The list is endless. It is not exhaustive.

[21] *Companies Winding Up Handbook*, Alex Chang Huey Wah, at p II 74:

However, as illustration, winding up on the just and equitable has been granted in Singapore and Malaysia:

(a) Where the substratum of the company has been lost: see *Chua Kien How v Goodwealth Trading Pte Ltd* …; *Re Sen son Auto Supplies Sdn Bhd* …;

(b) Where there is a deadlock in management of the company.

[22] *Winding-Up of Companies (Cases and Commentaries)*, KV Padmanabha Rau, at p 106:

3.32 Some general grounds on which the 'just and equitable' clause can be invoked.

(a) Inability of the company to pay its debts - winding up on just and equitable ground.

(b) winding-up where the substratum of the company has disappeared. It is trite law that 'where the main objective of a company has disappeared the court may order the company to be wound up on the just and equitable ground under s 218(1)(i) of the Act.

[23] *Malaysian Company Law (Principles & Practice)*, Ben Chan Chong Choon, Philip Koh Tong Ngee and Peter SW Ling, at p 907:

22.095 Reported cases illustrating the application of the 'just and equitable' ground for making a winding up order relate to:

Failure of the corporate substratum	
22.096	If it were shown to the satisfaction of the court that the whole substratum or the whole business which a company was incorporated to carry on has become impossible, it may be within section 218(1)(i) 'just and equitable' that the company should be wound up.

It is pertinent to note that none of the learned authors above state that the elements in *Ebrahimi*'s principle must be present before a petitioner can rely on the ground of just and equitable to wind up a company. The authorities above puts paid to the contention of the respondents that the elements of *Ebrahimi*'s case must be present for the just and equitable principle to apply.

WHETHER THE COMPANY IS DORMANT OR HAS LOST ITS SUBSTRATUM

[24] It is not in dispute that the company was incorporated on 15 November 1981 with nominal capital of RM500,000 and paid up capital of RM95,000. The petitioner asserts that the principal business of the company is the provision of transportation services. There is support for this statement first, from the search marked TCS1 conducted with SSM which reveals that nature of the business of the company is 'shipping'. It goes without saying that 'shipping' is a form of providing transportation. Secondly, the corporate information in TCS1 is consistent with the first object of the company as set out in the memorandum of association, exh TCS2. Thirdly, the petitioner pleaded that the company had only one client ie Achi Jaya Transportation Sdn Bhd. However, Achi Jaya Transportation Sdn Bhd is owned by the family members of the second respondent as shown in exhs TCS3. It has ceased all business dealing with the company and had suspended all its business operation since 2003. In the affidavit in opposition the respondents merely denied these assertions concerning Achi Jaya Transportation Sdn Bhd without adducing evidence to the contrary. I consider the denials as bare denials and nothing more. In my opinion, since Achi Jaya Transportation Sdn Bhd, which is a transportation company, was the sole client of the company, the irresistible inference is that the main object of the company (the first respondent) was providing transportation.

[25] The second respondent in the affidavit in opposition denies that the principle object of the company is transportation but did not adduce evidence before the court to prove any main object other than the provision of transportation services. This is just bare denial without more. For the reasons stated above, I find that the petitioner has established that the main object or

purpose of the company is the provision of transportation services. In view that the company's only client for the transportation services ie Achi Jaya Transportation Sdn Bhd had ceased doing business with the company and suspended all operations since 2003, the petitioner has established that the main objective for which the company was established has lapsed and ceased to exist. To my mind, the company has thus lost its substratum since 2003, more than nine years ago.

[26] The petitioner states that the relationship between him and the second respondent had irretrievably broken down which can be seen from the series of litigation which has led to loss of mutual trust and confidence thereby resulting in deadlock in management of all the companies undertaken by them. The respondents do not deny the series of litigation in court between the parties, but deny that there is a deadlock in management. To my mind, the numerous litigation and drawn out battles in court speak of the acrimony between the parties. It is rather futile to deny there is no deadlock in management of the company. There are after all only two surviving shareholders of the company namely the petitioner and the second respondent and they are locked in battle in the courts.

[27] The second respondent also claims that the petitioner has not come to court with clean hands as he had been disruptive, uncooperative and obstructive to the management of the company thus preventing the company from filing its audited reports and complying with the statutory requirements of CCM. This is disputed and denied by the petitioner. Without determining which side is more blameworthy, the fact remains that the company has not been able to comply with its statutory obligations for years due to the acrimony and dispute. To my mind, there can be no denying that there is a stalemate in the management of the company.

[28] Meanwhile, since the company has ceased to carry on its main objective which is the business of transportation since 2003, the substratum of the company has completely disappeared. The second respondent argues that this is not so because the company has other objectives as can be seen from the memorandum of association. In my judgment, this is beside the point. It is well settled that if the main object of a company has disappeared, the court can order winding up under the just and equitable rule. In the words of Kay J in *Re German Date Coffee* (1882) 20 Ch D 169:

> … although the memorandum may contain other words which include the doing of the other objects, those general words must be read as being ancillary to that which the memorandum shews to be the main purpose, and if the main purpose fails and fails altogether, then within the language of Lord Cairns in *Suburban Hotel Company's case* (1867) 2 Ch App 737 and within the decision of *Baring v Dix* 1 Cox 213, the substratum of the association fails.

[29] In *Liew Jai Hua v Johor Property (M) Sdn Bhd* [1998] 2 CLJ Supp 34, Abdul Malik Ishak J, as he then was, explained the failure of the substratum of a company as follows:

> … failure of substratum would be in a situation where the whole substratum of the company has gone down the drain; followed *Re German Date Coffee* (1882) 20 Ch D 169; *Galbraith v Merito Shipping Company* [1947] SC 446; *Re Kitson & Co Ltd* [1946] 1 All ER 435; and *Re Suburban Hotel Co* in which the substratum has been held to be gone when the main object for which the company was formed has become impracticable.

In *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd*, the Abdul Malik Ishak JCA reiterated the principle that it is just and equitable to wind up a company where the substratum of the company has gone and where the main object for its existence has lapsed. Similarly, in *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326; [1987] 1 LNS 110, Edgar Joseph Jr said:

> It is trite law that where the main objective of a company has disappeared the court may order the company to be wound up on the just and equitable ground (see s 218(1)(i) of the Act).

[30] I will just mention that in the decision of *Datuk Haji Mohammad Tufail bin Mahmud & 4 Ors v Dato' Ting Check Sii & 8 Ors*, Ravinthran Paramaguru JC, as he then was, stated that among the objects of the company in that case was to carry on business as sawmill proprietor and sawmilling contractor. Yet His Lordship was able to hold that the company in that case had lost its substratum because the company's sawmilling business had completely ceased with no prospect of revival. This illustrates the point that notwithstanding the existence of other objects set out in the memorandum, the substratum of a company may completely fail when the main object has failed. It is noteworthy that one of the petitioners in the case above is the second respondent in the present case and had succeeded in obtaining the winding up order based on the loss of substratum due to the failure of the main object. I do not see why the law should apply differently to the petitioner in the present case.

CONCLUSION

[31] Based on the authorities referred to above, since the first respondent has failed and ceased to carry its main objective of carrying on transportation services, I find and hold that the substratum of the company has completely disappeared and gone altogether. In addition, based on what has been said above, I find that the company has not been able to comply with its statutory obligations for years due to the acrimony and dispute between the petitioner and the second respondent. Further, there can be no denying that there is a stalemate in the management of the company. For all these reasons, it is just

and equitable, in my view, to order that the company be wound up under s 218(1)(i) of the Companies Act 1965.

ORDER OF THE COURT

[32] For all the reasons given above, I grant orders in terms of prayers (a)–(b) excluding Tan Ghee Kiat, who I understand has not yet consented to the nomination, and (c) of the petition and order that the first respondent be wound up under s 218(1)(i) of the Companies Act 1965.

LIQUIDATORS

[33] As regards the appointment of the liquidator, I have considered the submissions of learned counsels from both sides. I agree with counsel for the petitioner that under the circumstances, there might be difficulty engaging an approved liquidator in Sarawak. On the other hand, the liquidator proposed by the second respondent is not a desirable liquidator because the petitioner had filed a leave application in Kuching High Court on 10 October 2012 for his removal for allegedly breaching many of his primary duties as the liquidator of Sanyan Lumber Sdn Bhd (in liquidation) in which the petitioner holds 50% of the fully paid up shares. With regard the official receiver, it is common knowledge that they are overwhelmed with winding up petitions and bankruptcy matters. In the circumstances I accept the nomination of Mr TV Sekhar a/l TG Venkatesan who is an experienced approved company liquidator. I hereby appoint him as liquidator.

Application allowed and first respondent ordered be wound up.

Reported by Kanesh Sundrum